NO. 403

In the Supreme Court of the United States

OCTOBER TERM, 1927.

JERRY R. McCOY,
Petitioner,
vs.
A. S. J. SHAW, as State Auditor of the State of Oklahoma, and THE PURE OIL COMPANY, a Corporation,
Respondents.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF PETITIONER

Opinion Below

256 Pac. 25 (Not yet officially reported).

Jurisdiction

This Court granted application for writ of certiorari on the 31st day of October, 1927.

Question Presented

PART I.

Jerry R. McCoy is a Chickasaw Indian of one-fourth Indian blood, and there were allotted and patented to him certain lands in Carter County, Oklahoma. The period of twenty-one years from the date of his patent will not expire until some time in March, 1928. He still

retains the title to the land. By the statutes and decisions hereinafter set forth, such land is non-taxable so long as the title remains in said allottee, not to exceed 21 years from the date of patent. His land is leased to The Pure Oil Company under the usual form of oil and gas lease, whereby McCoy was to have as royalty one-eighth of the oil produced and certain portions of the gas. In 1916 the State of Oklahoma enacted what is known as the gross production tax statute, which purports to levy a tax of three per cent upon the royalty of McCoy. The lessee is producing and has been producing oil and gas from the premises for a number of years. In 1925 the State of Oklahoma enacted a statute purporting to authorize the State Auditor to demand of the lessee or purchaser of the oil, payment of the tax on this royalty in case it is not paid by the land owner. Thereafter and about September, 1925, the State Auditor made such an order upon The Pure Oil Company, the lessee, which was also the purchaser of the oil produced from the premises, and demanded that said company withhold from McCoy $1,054.63 for taxes on the royalty then unpaid and to continue to withhold sums from McCoy for the accruing gross production tax. This has been done and is being done by The Pure Oil Company. McCoy commenced his action in the District Court of Oklahoma County to enjoin the State Auditor from his acts and to require The Pure Oil Company to ignore the

same. The Auditor demurred to the petition, which was sustained, and when appealed by McCoy to the State Supreme Court, that Court affirmed the decision, applying Sections 9971 and 9973, C. O. S. 1921, which statutes are to the general effect that a person cannot contest taxes in any method except by paying the same and filing suit within certain time to recover back the taxes, as provided by statute. We say that as to this petitioner such statute is not applicable for the reason that the real gravamen of the suit is to protect the vested property right of McCoy, said exemption from taxation being such vested property right, which arose from his contract with the Federal Government and the federal enactments relating thereto, and which was assented to by the State in its Constitution; contending further that the fact that a tax happened to be involved was incidental and but a means of impairing and destroying this vested property right. McCoy further contends that inasmuch as this gross production tax is payable quarterly that in order to avail himself of the remedy provided by statute he would be subjected to a multiplicity of suits, and that therefore the legal remedy is not adequate. He also contends that there is no provision of the Oklahoma law or remedy provided when the taxpayer claims his property is exempt, and that this constitutes an important exception to the doctrine of non-interference by injunction.

PART II.

As to the merits of the controversy, McCoy contends that inasmuch as his land is not taxable that therefore this royalty, which is his part of the oil derived therefrom, is likewise exempt from taxation on the theory that where the principal is immune from interference the produce and yields derived therefrom are likewise immune and exempt.

The State authorities contend that such royalty is subject to taxation under the State Production Tax Statute.

The Statutes

(See Appendix hereto.)

Statement

The petitioner, McCoy, is a Chickasaw Indian of one-fourth blood, duly enrolled as such. There was patented to him as such Indian the land described in the record, situated in Carter County, Oklahoma, a portion of which is known as homestead allotment and the other as surplus. His patent for the surplus was dated March 23, 1907, and patent for the homestead dated March 21, 1907. Before action was commenced by McCoy and while he was still a minor, the land was leased to The Pure Oil Company in the customary form for oil and gas leases, providing that McCoy should have a royalty of

one-eighth of the oil produced and oil was so produced under the lease while the petitioner was a minor and for some time before he commenced this action, and is still being so produced. McCoy became of age in the spring of 1925. Thereafter, there being some unpaid tax which the State Auditor alleged was due from McCoy on this royalty, the State Auditor issued an order to The Pure Oil Company, it being the purchaser of McCoy's royalty oil, as well as the lessee, to withhold from McCoy the sum of $1,054.63, which the Auditor claimed was the tax then due with penalty, under the Gross Production Tax Statute of Oklahoma, and ordered the oil company to continue to withhold the tax accruing for each quarter annual period in the future, all of which has been done and is being done by the company.

The restrictions on the alienability of this land were removed as to McCoy by Section 1 of the Act of Congress of May 27, 1908, 35 Stat. 312, as McCoy is of only one-fourth Indian blood. McCoy still being the owner of the land, contended his royalty was not taxable and commenced his action in the District Court of Oklahoma County on October 20, 1925, to enjoin the State Auditor from his acts; to cancel the said order by the State Auditor; to require the oil company to ignore the same, and to permanently enjoin and forbid the Auditor, his employes and successors, from attempting to collect any

such tax. Furthermore, he alleged that said royalty oil was exempt from such tax on account of the fact that the land from which it was produced was exempt; that to so attempt to tax his royalty was contrary to and in violation of the laws of the United States as contained in the agreement between the United States and the Choctaw and Chickasaw Nations, and in violation of the exemption from such taxation as was contracted with him and guaranteed to him under the agreement and acts of Congress relating thereto.

He further alleged that the gross production tax statute of Oklahoma, as construed by the Supreme Court of Oklahoma (*In re. Skelton Lead & Zinc Co.*, 81 Okla. 134, 197 Pac. 495), was a tax upon the mining business as a going concern, and is the payment of tax upon numerous rights, including the machinery, appliances and equipment used in and around a well producing petroleum; that only the lessee had such machinery or equipment, and that he, McCoy, had nothing but the land in connection with said production, and that to require McCoy to pay 3% of his part of the oil, which pays upon the oil alone, and to permit the lessee to pay 3% upon his part of the oil, which was a payment of tax upon all of his other rights, constituted a taking of his property to pay the tax of the lessee without compensation to him, depriving him of his property without due process of

law, and was a denial to him of the equal protection of the law, and imposed upon him a tax which was not uniform among the people obtaining oil from beneath the surface of the earth and is a discrimination in said tax law against him.

He further alleged that said gross production tax statute in fact exempted his royalty from such taxation, but that the State Auditor was erroneously holding and ruling that the same was not exempted, but subject to tax. He alleged that he was the owner of other valuable real estate in Oklahoma County, and that said statute on its face attempts to make such a lien upon all the property of McCoy, and was therefore apparently a cloud thereon and there was no means or method of removing such cloud, except by this action; that such a lien was invalid and was not due process of law as against him.

He further alleged that the action of the State Auditor in issuing said order was in violation of the laws of the United States, and that he and his successors should be enjoined from unlawfully and wrongfully interfering with the rights of McCoy and attempting to impose this unlawful and void tax and unless enjoined the State Auditor would continue in the future to order the withholding of the portion of McCoy's royalty to pay this tax, all of which would be without authority of law and

in violation of the rights, immunities, exemptions and privileges guaranteed to McCoy under the said Atoka agreement and the Acts of Congress relating thereto. He further alleged that the purported tax upon his royalty and the attempt to enforce the same, violates his rights and imposes unlawful and injurious burdens and charges upon him in freeing himself and his property from such injurious and unlawful taxes and cause him to employ attorneys, to bear other unjust burdens, costs and charges, and that in that regard he will also suffer continued irreparable damage and injury and that he is without adequate remedy at law.

He prayed that the Auditor and his successors be permanently enjoined from collecting or attempting to collect this tax on this royalty oil, and that the order of the State Auditor to the oil company to withhold any portion of the same be annulled and set aside, that the oil company be directed to ignore said order, as well as any future orders from the State Auditor, and that he have all such other general and equitable relief as may be proper (R. 1-9).

The oil company filed an answer, admitting the Auditor had made the order upon it, and that it was holding the moneys due McCoy on his royalty oil pursuant to the order (R. 19).

The Auditor, through the Attorney General, filed

motions to dismiss, which are but general and special demurrers, and were so treated by the trial court (R. 9-14). Said motions so treated as demurrers were sustained (R. 14-15).

McCoy appealed to the Supreme Court of Oklahoma, which affirmed the judgment of the trial court, the syllabus of the opinion being as follows:

> "1. Section 9814, Compiled Oklahoma Statutes, 1921, relating to a lien for gross production tax upon a royalty interest provides that 'the amount of tax on the royalty interest shall be a lien on such interest,' and such a provision for such a lien on such interest is construed *strictissimi juris* and excludes a lien for such interest upon any other property, notwithstanding Section 9818, Compiled Oklahoma Statutes, 1921, which provides generally for the levy and collection of said gross production tax from the property, assets and effects of such persons, firm, association or corporation, and constitutes the tax a lien upon such property, and provides for a suit thereon.
>
> "2. Section 9814, *supra,* permits an aggrieved taxpayer of a gross production tax to pay such tax under protest and giving of notice, and the institution of an action at law to recover the same, and such a remedy is adequate, speedy, complete and exclusive" (R. 16-17).

Summary of Argument

Part I.

The petitioner contends that the state statute applied by the Supreme Court of Oklahoma, which requires as the exclusive remedy the payment of the tax and suit

to recover, is not applicable in this case; that his claim is based upon an exemption from taxation and that such exemption is given to him by his contract with the Federal Government and the federal enactments relating thereto, which were specifically assented to by the State in its Constitution, and that such exemption constitutes a vested property right. His action is really to preserve from destruction this vested property right, and the fact that a tax happens to be the means used by the State in attempting to destroy this vested property right is but incidental, as he is entitled to have this vested right protected from any means of destruction by the State; further contending that if this state statute were applicable to him still it does not give him an adequate remedy for the reason that this tax is payable four times a year and he would be involved in a multiplicity of suits in an attempt to avail himself of such remedy; that a legal remedy so burdened is not adequate. He also contends that there is no state statute applicable to a situation where the taxpayer claims his property is exempt from taxation.

PART II.

The petitioner further contends that inasmuch as his land, from which this oil is being produced, is exempt from taxation until March, 1928, that therefore his royalty interest, which is simply his part of the oil produced

from this land, is likewise exempt; that his part of the oil, to-wit, 1/8 thereof, which is the royalty, remains his at all times, and that under the lease the lessee is given 7/8 of the oil found on account of the uncertainty as well as the large expense involved in exploring for and producing the same. That if this tax be considered as a tax upon the land *eo nominee,* that then such tax is clearly illegal; that if such tax be considered as a tax upon the produce or yields of the land, or upon the occupation and uses of the land in obtaining such oil, that then such tax is clearly illegal under the principle of *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429, 39 L. Ed. 759, and the later cases to which we will refer. The petitioner further contends that he may be considered as an agency or instrumentality of the Government for using and developing his lands and obtaining therefrom the ores, as the whole policy of the Federal Government shows that it was the desire of the Government that the Indian so use his lands, and he is a part of the instrumentality employed by the Government in equipping the Indian and training him in the individual uses and ownership of property in order that the Indian might take his place alongside the other citizens.

ARGUMENT

Part I.

The state statute is inapplicable and the Supreme Court of Oklahoma erred in deciding the case thereon.

The Supreme Court of Oklahoma decided this case on the ground that the statute requiring the payment of the tax and suit to recover same back was exclusive and that therefore McCoy could not maintain the action. That Court overlooked the fact that the real substance of the action is to restrain the State and its agencies from violating the vested property rights of the petitioner and to protect his exemption from taxation, which arises from his contract with the Federal Government and the Federal enactments relating thereto, which is a vested right and cannot be interfered with by State legislation or State agencies, and which exemption was specifically assented to by the State in its Constitution.

—*Berryman* v. *Board of Trustees of Whitman College*, 222 U. S. 334.

Ward v. *Love County*, 253 U. S. 17.

Choate v. *Trapp*, 224 U. S. 665.

This state statute cannot be interposed to justify the officers of the State in attempting to violate the vested rights of the petitioner, as the same are protected by Article VI, Article X and the Fifth and Fourteenth

Amendments to the Constitution of the United States, and this Court will take jurisdiction and decide the real merits where the decision of the Supreme Court of the State avoids the merits of the controversy and decides against the petitioner by applying some inapplicable state statute or decides the case upon some other ground, wholly untenable.

—*Bunch* v. *Cole*, 263 U. S. 250.
Ward v. *Love County, supra.*

The fact that a tax is involved in this action is but incidental. The main purpose and effect of the action is to preserve and protect the vested property right of the petitioner, his exemption from taxation being such right.

—*Berryman* v. *Board of Trustees of Whitman College, supra.*

The Oklahoma statute upheld by the Oklahoma Supreme Court, requiring the payment of the tax and the suit to recover same, has no application where the matter to be protected is a vested property right, and the tax is but incidental, and but the means, or one of the means, of violating such right. This gross production tax is payable quarterly, and therefore it would involve four times as much litigation each year as the ordinary tax, which is payable annually. It is readily seen that if McCoy were required to follow the Oklahoma statute he would not only be required to be burdened with the

payments of these taxes in order to maintain his action, but he would be involved in four times as many law suits, paying out four times as much counsel fees and advancing four times as much costs as would ordinarily be the case. Certainly equity to prevent such multiplicity of suits has jurisdiction, regardless of the Oklahoma statute.

—*Osborne* v. *Bank of United States*, 9 Wheat. 738.

United States v. *Rickert*, 188 U. S. 432.

The State of Tennessee has a statute upon which Section 9971 of the Oklahoma statute is patterned. That statute was upheld by this Court in *Tennessee* v. *Sneed*, 96 U. S. 69. The Oklahoma decision appealed from here relies principally upon that decision of this Court, and the Oklahoma Court takes the view that such statute is exclusive in all events. Such though is not the view of this Court. This Court decided the Sneed case in November, 1877.

Later there was a case, which arose in Tennessee, decided by Judge Lurton, later Justice Lurton, in October, 1901, to-wit, *Union & Planters Bank of Memphis* v. *Memphis*, 111 Fed. 561. In laying down the grounds which would authorize equitable interposition, regardless of the Tennessee statute, the Court mentioned as such ground the subjection to a multiplicity of suits if compelled to rely upon a legal remedy alone, using this language:

> "If it appears that the tax constitutes a cloud upon the title of the complainant or that he will be subjected to irremedial damages or to a multiplicity of suits if compelled to rely upon a legal remedy alone, equity will interfere on the ground of the inadequacy of the remedy at law."

After the case of *Tennessee* v. *Sneed* was decided, another case came up from Tennessee, to-wit, *Shelton* v. *Platt*, 139 U. S. 591, which was decided in April, 1891, and in that case this Court clearly recognizes that even though Tennessee has such a statute, it does not prevent the maintaining of equitable suits such as injunctions, where there is ground for equitable interposition such as the prevention of multiplicity of suits or irreparable injury. Otherwise it would have been unnecessary for this Court to have used the following language in the last mentioned case:

> "And while an unconstitutional tax may, in the language of the learned Judge holding the Circuit Court, confer no right, impose no duty and support no obligation, it will be perceived that in our view the trespass resulting from proceedings to collect such void tax cannot be restrained by injunction where irreparable injury, *or other ground for equitable interposition is not shown to exist.*" (Italics ours.)

The injunction was denied in that case only because the bill did not show that the equitable action was necessary to prevent irreparable injury and there was no claim of a multiplicity of suits. See, also, *Johnson* v. *Wells Fargo Co.*, 239 U. S. 244.

McCoy in his petition set up the fact that he will be involved in numerous law suits and will also suffer irreparable injury. The only reason for saying that the Oklahoma statute requiring the payment of the tax is exclusive is on the theory that the same affords an adequate remedy at law, yet, as stated in the two last quoted cases, a remedy at law is not adequate where a party, in order to rely upon such legal remedy, would be subjected to a multiplicity of suits. The Oklahoma Court overlooked this pertinent point of law.

There is no provision of the Oklahoma law or any legal remedy provided where the taxpayer claims his property is exempt, and this constitutes an important exception to the doctrine of non-interference by ~~exemption~~.

—*Colorado F. & L. S. Co.* v. *Beerbohm*, 96 Pac. 443.

Siegfried v. *Raymond*, 60 N. E. 868.

Bednar v. *Carroll*, 116 N. W. 315.

Lenawee County Savings Bank v. *City of Adrian*, 33 N. W. 304.

St. Mary's Gas Co. v. *Elk County*, 43 Atl. 321.

Crim v. *Town of Phillipi*, 18 S. E. 466.

Union Pac. R. Co. v. *McShean*, 22 Wall. 444, 22 L. Ed. 747.

High on Injunctions, Vol. 1 (4th Ed.), page 504.

Missouri River F. S. & G. R. Co. v. *Morris*, 13 Kan. 302.

City of Staunton v. *Mary Baldwin Seminary* (Va.), 39 S. E. 596.

Lastly we believe it proper to say here that this tax is assessed quarter-annually for the periods ending with March, June, September and December of each year. The tax is payable within thirty days after such period. The Supreme Court of Oklahoma has recently held that in order for the taxpayer to avail himself of the statute permitting the payment of the tax and suit to recover same, he must not only pay the tax under protest, but must so pay the same within the time the same is made payable by law.

—*S. L. & S. F. Ry. Co.* v. *Hendrickson* (not yet officially reported), decided Oct. 25, 1927.

McCoy's exemption expires in March, 1928. The time fixed by law for the payment of the tax has already passed for practically all of the tax from which he is claiming exemption. It is readily seen that if he cannot succeed in the present equity action, he is without remedy and will be forced to submit to this illegal tax and cannot now pay same and sue to recover it back.

Part II.

A.

If this tax is considered as a tax on the land it is clearly illegal, as the land is exempt.

It has been settled by this Court that this land of McCoy's is exempt from taxation.

—*Choate* v. *Trapp*, 224 U. S. 665, 56 L. Ed. 941.

Such exemption is a vested property right and as such is immune from interference by State legislation.

—*Choate* v. *Trapp, supra.*

Ward v. *Love County,* 253 U. S. 17, 64 L. Ed. 751.

Berryman v. *Board of Trustees of Whitman College,* 222 U. S. 334.

This tax exemption arising under the Atoka agreement, as mentioned, likewise constitutes a contract between the Chickasaw Tribe of Indians and the National Government.

—*Choate* v. *Trapp, supra.*

Minnesota has a Gross Production Tax Statute which seems to be very similar to the Oklahoma statute. This Court in *Lake Superior Consol. Iron Mines et al.* v. *Lord et al.,* 271 U. S. 577, held that such a tax was really a tax upon the land. We quote from that decision as follows:

> "By their several bills in the United States District Court, appellants alleged the invalidity of Chapter 226, Laws of Minnesota, approved April 11, 1923, because of conflict with the Fourteenth Amendment and the State Constitution. They sought to prevent its enforcement. That court held the enactment valid and, by decrees entered January 15, 1925, dismissed the bills. These appeals followed.
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> "The challenged act (fourteen sections) effective from its passage provides:
>
> "Sec. 1. There shall be levied and collected upon

all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this state, a tax of six (6) per cent.

"Sec. 2. For all purposes of this Act the word 'royalty' shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this state for permission to explore, mine, take out and remove ore therefrom; and the word 'person' shall be construed to include individuals, co-partnerships, associations, companies and corporations.

"Succeeding sections relate to reports to the Tax Commission, method of assessment, penalties, date of payment, etc. Section 5 provides: 'A person subletting land for the use of which he received royalty shall be required to pay taxes only on the difference between the amount of royalty paid by him and the amount received.' And Section 8: 'The situs of royalty for all purposes of this act shall be in this State; and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable, in and to the land for permission to explore, mine, take out and remove ore on which the royalty is paid."

And then speaking with reference to said enactment the Court continued:

"Ultimate construction of Chapter 226 is for the state courts, but, in the absence of that, we think the enactment may be reasonably interpreted as laying a tax upon interest in mineral lands from which permission has been given to extract ores upon payment of royalty. The amount of the exaction is determined

by reference to the sum actually received for the use of such interests.

"As the tax is laid upon land, neither the owner's residence nor the place fixed for payment of the royalty is important."

See, also:

—*State* v. *Synder* (Tex.), 281 S. W. 758.

State of Texas v. *Hatcher* (Tex.), 281 S. W. 192.

Opinions of Attorney General, Vol. 19, p. 161.

Barnes v. *Keyes,* 37 Okla. 6, 127 Pac. 261.

In the Oklahoma case cited, the Court had under consideration oil, and speaking specifically as to such oil and that being the mineral referred to, said:

"In other words, it is held that the minerals are part of the land itself and that the life tenant has no right to take the minerals any more than he would have the right to sell or dispose of a part of the surface of the lands."

B.

If this tax is considered as a tax upon the yield or produce of the land, such tax is illegal.

In the case of *Pollock* v. *Farmers Loan & Trust Co., supra,* this Court laid down the broad principle that where the land itself was non-taxable the income and yields therefrom were likewise non-taxable. That case involved a national income tax law before the Sixteenth Amendment to the Constitution, and involved such taxes

attempted to be levied upon the rents or income of land. This Court held that could not be done as the same would in effect be a tax upon the land itself. In stating the broad principle of the question, this Court there said:

> "If the Constitution had provided that Congress should not levy any tax upon the rea. estate of any citizen of any State, could it be contended that Congress could put an annual tax for five or any other number of years, upon the rents or income of the real estate?"

The question was answered in the negative. By transposing the relative positions of the National Government and the State of Oklahoma in the question just answered by this Court, the question there seems entirely analogous to the case at bar. In the Pollock case the Constitution prohibited the National Government from imposing unapportioned tax on real estate. In the case at bar the State of Oklahoma in its Constitution has specially agreed that all existing rights should continue as if no change in government had taken place and that property exempt from taxation by virtue of treaties and federal laws should so remain during the force and effect of such treaties or federal laws.

—*Choate* v. *Trapp, supra.*

These federal laws provided that the land of McCoy should be exempt from taxation. No particular kind of taxation was specified, but the broadest term was used which could be imagined and which would certainly cover

all classes of taxation regardless of the name. The name of the tax is immaterial.

—*Choate* v. *Trapp, supra.*

Choctaw O. & G. R. Co. v. *Harrison,* 235 U. S. 219, 59 L. Ed. 237.

Thus in the Pollock case the National Government could not tax the income and yields of lands without apportionment on account of the prohibition of the Federal Constitution against taxing the land, and on the same principle the State of Oklahoma cannot tax the income and yields from McCoy's land because of the federal laws to which the State agreed, exempting the land itself from taxation.

See, also:

—*Northwestern Mutual L. Ins. Co.* v. *State of Wisconsin,* — U. S. — (decided Nov. 21, 1927).

Thomas v. *Gay,* 169 U. S. 264, 42 L. Ed. 740.

Gillespie v. *State of Oklahoma,* 275 U. S. 501, 66 L. Ed. 338.

Jaybird Mining Co. v. *Weir,* 46 Sup. Ct. Rep. 582.

The case of *Gillespie* v. *Oklahoma, supra,* seems to settle this question in favor of McCoy. Therein this gross production tax statute of Oklahoma is discussed as is also the income tax law, and this Court treats the decisions as equally applicable and as settling the prin-

ciple whether the subject under discussion is gross production tax or income tax, and announced in that case the rule applicable to both such classes of taxation in the following language:

> "In cases where the principal is absolutely immune from interference, an inquiry is allowed into the sources from which net income is derived, and if a part of it comes from such a source, the tax is *pro tanto* void. * * *"

At the time that opinion was written the case of *Choctaw O. & G. R. Co.* v. *Harrison, supra,* involving a prior gross production tax of Oklahoma, had been decided. In that case this Court held the tax amounted to an occupation tax.

Also *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522, had been decided, which involved the ordinary *ad valorem* tax of Oklahoma on restricted Indian's leases. Also at that time there had been decided the cases of *Howard* v. *Gypsy Oil Co.,* 247 U. S. 503, 63 L. Ed. 1239, and *Large Oil Co.* v. *Howard,* 248 U. S. 549, 63 L. Ed. 416, both of which involved the gross production act of Oklahoma of 1916 (the very act which we are now considering), as applied to these Indian matters, and in the Gillespie case this Court, after referring to the cases of *Choctaw O. & G. R. Co.* v. *Harrison* and *Ind. Territory Illumniating Oil Co.* v. *Oklahoma,* said that the principle of those two cases was applied to the gross

production tax statute of Oklahoma of 1916 when passing upon the two Howard cases, *supra*, using this language:

> "Subsequently the principle was applied *per curiam* to gross production taxes under a later statute of 1916 without reference to the fact that the taxes instead of being in addition to were in lieu of all taxes upon property rights. *Howard* v. *Gypsy Oil Co.*, 247 U. S. 503, 63 L. Ed. 1239; *Large Oil Co.* v. *Howard*, 248 U. S. 549, 63 L. Ed. 416."

In the Gillespie case this Court also said:

> "The decision in 240 U. S. 522 (*Ind. Ter. Ill. Oil Co.* v. *Oklahoma*) that such leases were not taxable went on general principles, not on the nature of the particular statute."

In *Brown* v. *Maryland*, 25 U. S. 12 Wheat 419, 444, it was held that a tax on the occupation of an importer was the same as a tax on imports, and therefore void.

In *Weston* v. *Charleston*, 27 U. S. 2 Pet 449, it was held that a tax on the income of the United States securities was a tax on the securities themselves and void.

In *Dobbins* v. *Erie, County Commissioner*, 41 U. S. 16 Pet. 435, it was held that the income from an official position could not be taxed if the office itself was exempt.

In *Almy* v. *California*, 65 U. S. 24 How. 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented.

In *Northern Central Ry. Co.* v. *Jackson*, 74 U. S. 7

Wall. 262, it was held that a tax upon the interest payable on bonds was a tax not upon the debtor but upon the security.

In *Cook* v. *Pennsylvania,* 97 U. S. 566, it was held that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

In *Philadelphia S. & M. S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, and *Leloup* v. *Mobile,* 127 U. S. 640, it was held that a tax on income received from interstate commerce was a tax on the commerce itself, and therefore void.

The whole gist of the thought here is contained in the following quotations from the case of *Pollock* v. *Farmers Loan & Trust Co.,* to-wit:

> "The general rule has always been, in the language of Coke, that, 'If a man seized of land in fee, by his deed granted to another the profits of those lands, to have and to hold to him and his heirs and made a delivery *secundum forman charta* the whole land itself doth pass. For what is the land but the profits thereof?'"

And again:

> "Mr. Justice Patterson observed in *Hylton* v. *U. S.,* 3 U. S. 3 Dall. 171, 'Land independently of its produce is of no value.'"

Before closing under this head we wish to refer to the case of *Forbes* v. *Gracey,* 94 U. S. 762, 24 L. Ed. 313, as the State seeks its strongest support from that case.

However, when the facts of that case are examined it is found that it is exactly opposite to the case at bar. There the Federal Government in Nevada and other Pacific States had permitted persons, firms and corporations to take the ores from the government land without any compensation therefor and without even paying for the land, and the Government by its statutes provided that at the moment such ores became detached from the soil they became personal property, the exclusive ownership of which was in the person extracting the same, and that by reason of said statutes of the United States relating thereto and the rule of the Government on the subject,

> "It is then free from any lien, claim or title of the United States."

The property having been so detached and being then the exclusive personal property of the taker, it was sought to be taxed. This Court properly held the same taxable. The distinction between that case and the case at bar is this: The Federal Government and its property is not taxable by the State, but there the Federal Government when the tax was sought to be asserted, had no lien, claim or title to the property, as it had relinquished all of the same to the taker. In the case at bar, McCoy and his allotted land is not taxable by the State, and McCoy still has his land and this oil which the State is attempting to tax is still McCoy's oil taken from under his allotted land. If the United States Government had

still retained the title to these ores in the Forbes-Gracey case and had not relinquished the same, and the State had then attempted to tax said ores, it is clear that the same would not have been taxable, and that the Forbes-Gracey case would have so held.

C.

McCoy is the instrumentality of the Government in using his land and mining ores therefrom, and on this principle his oil is not taxable.

Here we say that the attempt to tax McCoy's royalty is an interference with the purpose and policy of the Federal Government, and in that respect an interference with and a violation of a federal agency. When the treaty was made in 1898 it was then the hope and policy of the National Government to teach the Indian the individual uses and ownership of property, and thus to prepare him to take his place on an equal footing with the other citizens of the United States, totally abandoning the old tribal government and the common ownership of land. This was a marked change in the Indian's mode of life. The Government wished the Indian to use his land under the separate ownership to the fullest extent, thus enabling him to rely upon his own resources and to support himself individually. There are still many Indian tribes who are incompetent to take care of themselves, and the Government in caring for such Indians,

deems it to be its duty to see that the ores are mined from such Indian's land for the benefit of the Indian, and in such cases the lessee, which is the instrumentality for that purpose, is but a part of the scheme of the Government in fulfilling its duty. This Court says such in the case of *Jaybird Mining Co.* v. *Weir, supra,* as follows:

> "The lessee is an agent or instrumentality employed by the Government for the development and use of restricted lands and to mine ores therefrom for the benefit of its Indian wards."

And again:

> "In each of these cases the tax was condemned as an attempt to tax an instrumentality used by the Government in fulfilling its duty to the Indian."

If the Government while acting as guardian of the Indian deemed it to be its duty "to develop and use the Indian's land and mine the ores therefrom for the benefit of the Indian," then surely the Government when it turned the land over to the Indian wished the Indian to do those very things for himself. The allottee is the instrumentality of the Government for those purposes, just as much so as was the lessee where the Government was acting as guardian and employed a lessee to obtain the ores or oil from the land. So we say that the Government desired that McCoy should use this land, should mine the ores therefrom, including this oil, and that the

attempt to tax him upon the same would interfere with the policy, purpose and scheme of the Government and in fact would destroy its whole purpose.

—*United States* v. *Rickert*, 188 U. S. 432, 47 L. Ed. 532.

Any scheme, policy or method employed by the Government in carrying out its policy with the Indians is a governmental agency. Thus in *McCurdy* v. *United States*, 246 U. S. 263, 62 L. Ed. 706, this Court said:

> "It is education through the responsibility of spending * * * which constitutes the instrumentality employed by the Government in fitting the individual Osage Indian to take his full part as a citizen of the United States."

See, also:

—*United States* v. *Bean*, 253 Fed. 1.

Weston v. *Charleston, supra.*

Surely the Government when it was trying to encourage the Indian to use his land did not wish that he should be hampered and discouraged by having a tax imposed upon him each time he broke the crust of the earth in the uses thereof or to obtain some deposits from underneath the surface thereof, or if he should make it up into brick or sell some of the gravel therefrom by the wagonload. The Indian certainly did not understand that he was to be so taxed. He used the broadest term possible by saying that his land should be non-taxable,

which covered every character of tax, whether it should be denominated income tax, gross production tax, license tax, occupation tax or otherwise. The name of the tax is immaterial.

CONCLUSION

We say that this royalty of the petitioner should be held non-taxable. If this Court, after fully considering the matter, should entertain a doubt as to whether or not this royalty is taxable, that doubt should resolve the question in favor of the Indian, as was said in *Choate* v. *Trapp, supra*:

> "The construction instead of being strict is liberal. Doubtful expressions, instead of being resolved in favor of the United States are to be resolved in favor of a weak and defenseless people, who are wards of the Nation and dependent wholly upon its protection and good faith. This rule of construction has been recognized without exception for more than a hundred years and has been applied in tax cases. * * *
>
> "In view of the universality of this rule, Congress is conclusively presumed to have intended that the legislation under which these allotments were made to the Indians should be liberally construed in their favor in determining the rights granted to the Choctaws and Chickasaws. * * *
>
> "But if there is any conflict between the natural meaning and the technical construction—if there were room for doubt or if there were any question as to whether this was a personal privilege and repealable or an incident attached to the land itself for

a limited period, that doubt under this rule must be resolved in favor of the patentee."

Respectfully submitted,

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